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Supreme Court, U.S.
FILED
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No. 95-8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

KIRK M. BROWN,

Petitioner,

v.

THADDEUS KILGORE, JR.;
OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION,
AFSCME LOCAL 11, AFL-CIO; and
STATE EMPLOYMENT RELATIONS BOARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENTS KILGORE AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION'S BRIEF IN OPPOSITION

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INTRODUCTION

The citations to the opinions below and the basis for this Court's jurisdiction are correctly set forth in the petition for the writ of certiorari at p. 2. Respondents Kilgore and Ohio Civil Service Employees Association accept the Statement of the Case as presented by Respondent State Employment Relations Board in its Brief in Opposition at p. 1.

REASONS THE PETITION SHOULD BE DENIED

Supreme Court Rule 10 sets forth several considerations that this Court considers in deciding to grant a writ of certiorari. No such consideration exists in the instant case. To the best of our knowledge, there exists no conflict between the decision reached by the Supreme Court of Ohio and any other state court of last resort or any federal circuit court. Nor can we discern any conflict with any decision of this Court. Nor, finally, do we feel that the issue presented here is of such importance that this Court needs to address it.

1. No important question of federal law exists in this case which warrants review.

Petitioner presents this Court with no justification for its granting the writ besides an admonition that the Supreme Court of Ohio's justification for dismissal of petitioner's appeal, *i.e.*, its reliance upon a previous decision, "constitute[d] a decision of an important question of federal law which has not been, but should be decided by this [C]ourt." Pet. at 11. Petitioner does not, however, explain why this case or the issue implicated are so important as to warrant this Court granting certiorari. A citation is provided to *R.J. Reynolds Tobacco Co. v. Durham*

County, 479 U.S. 130 (1986), but that case, which concerned the imposition of an *ad valorem* tax upon imported tobacco products stored in a customs warehouse, bears no relevance to the instant facts.

Part of this Court's opinion in *R.J. Reynolds* stated that a party may seek review in this Court from a decision of an inferior state court denying review from an inferior state court for want of a substantial constitutional question. Finding that a state statute had been upheld against federal constitutional challenge, this Court found that jurisdiction lay for an appeal to this Court under 28 U.S.C. Section 1257(2), as the denial of review by the highest state court constituted a final judgment. *R.J. Reynolds*, 479 U.S. at 137-38. With this, Respondents do not take issue: discretionary jurisdiction does exist in this Court. There is, however, no reason for this Court to exercise it.

2. There is no conflict between courts regarding this issue as it exists under the similar Labor Management Relations Act.

Ohio's Public Employee Collective Bargaining Act, Ohio Rev. Code Sections 4117 *et seq.*, is patterned after the Labor Management Relations Act, 29 U.S.C. Sections 141 *et seq*. The State Employment Relations Board ("SERB"), the body created to administer the Act in Ohio, acts as the functional equivalent of the National Labor Relations Board. Each possesses a dual identity: prosecutor and adjudicator. The prosecution of unfair labor practices under Ohio law is conducted by SERB acting as a prosecutor, much the same as the NLRB General Counsel acts under the LMRA. Adjudication of charges brought by SERB is performed by the Board, a three-member entity that acts as judge, in much the same manner as the NLRB. As the Supreme Court of

Ohio noted in the opinion which is ultimately being challenged by Petitioner, "[T]he procedures for unfair labor practice cases mandated by R.C. 4117.12 and 4117.13 are substantively identical to those established in Section 10 of the Labor Management Relations Act to govern unfair labor practices before the National Labor Relations Board." *Ohio Assn. of Pub. School Employees, Chapter 643 v. Dayton City School Dist. Bd. of Edn.*, 572 N.E.2d 80, 83, 59 Ohio St. 3d 159, 161 (1991)

The issue of the prosecutorial versus the adjudicative function in the context of the powers of the NLRB has been well resolved in the circuits. There is no conflict. These courts have found that a decision of the NLRB General Counsel not to pursue a case, *i.e.*, not finding probable cause to issue a complaint or withdrawing a previously issued complaint in light of new evidence, is not reviewable in court as it is essentially prosecutorial, and, therefore, not an adjudication by the Board.[1]

Further, this denial of review has been uniformly found not to constitute a deprivation of due process. In

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[1] *See, e.g., International Ass'n of Machinists v. Lubbers*, 681 F.2d 598, 602-03 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983); *George Banta Co. v. NLRB*, 626 F.2d 354, 356-57 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Hernandez v. NLRB*, 505 F.2d 119, 120 (5th Cir. 1974); *Braden v. Herman*, 468 F.2d 592, 593 (8th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973); *Saez v. Goslee*, 463 F.2d 214, 214-15 (1st Cir.), *cert. denied*, 409 U.S. 1024 (1972); *National Maritime Union v. NLRB*, 423 F.2d 625, 626 (2d Cir. 1970); *Mayer v. Ordman*, 391 F.2d 889 (6th Cir.), *cert. denied*, 393 U.S. 925 (1968); *Balanyi v. Local 1031, IBEW*, 374 F.2d 723 (7th Cir. 1967); *Hourihan v. NLRB*, 201 F.2d 187 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 930 (1953); *General Drivers, Local 886 v. NLRB*, 179 F.2d 492, 494-95 (10th Cir. 1950). *Cf. Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (instances where this Court has presumed that NLRB prosecutorial decisions are not reviewable in court).

International Ass'n of Machinists v. Lubbers, 681 F.2d 598 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), the appellant asserted a "private right" in the prosecution of its unfair labor practice charge and demanded a hearing before the NLRB General Counsel withdrew a complaint it had initially issued in the case. The Ninth Circuit, while noting that parties often have important rights in the context of an NLRB proceeding, also noted that this right has never been held to be a *constitutional* right. It ultimately found that it did not in fact rise to that level. Correspondingly, no review was required. *Machinists*, 681 F.2d at 603-604.

In *Saez v. Goslee*, 463 F.2d 214 (1st Cir.), *cert. denied*, 409 U.S. 1024 (1972), the First Circuit was also confronted with a due process challenge to this denial of review. Finding that "it is doubtful that appellant has an 'entitlement' to have an unfair labor practice complaint issue in the same sense that, for example, a welfare recipient has a statutory entitlement to benefits," and that the remedies of the LMRA protect "public rather than private rights," the First Circuit refused to elevate the right to constitutional status. *Saez*, 463 F.2d at 215. Even if the "right" was protected by the Due Process Clause, the court did not deem it serious enough to warrant the requirement of a hearing. The court juxtaposed the "right" to review of a decision by the NLRB not to issue a complaint with the termination of welfare benefits at issue in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and found the former to be much less "essential to an individual's continued existence." *Saez*, 463 F.2d at 215. *See also Braden v. Herman*, 468 F.2d 592, 593 (8th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973) (emphasizing the public nature served by the LMRA as reason to deny constitutional status to a charging party's "right" in an unfair labor practice proceeding).

There is, in short, no conflict between the circuit courts as to the constitutionality of the denial of review of NLRB's prosecutorial functions under the Due Process Clause of the Fifth Amendment. Because SERB acts in much the same manner as NLRB, and due process concerns have been addressed by the circuits, there is no conflict between the Supreme Court of Ohio and any circuit court on this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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